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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1962.

No. 461

HOOPER ENLOE DENTON, OMER CLARENCE PHILLIPS, BILLY WEBB,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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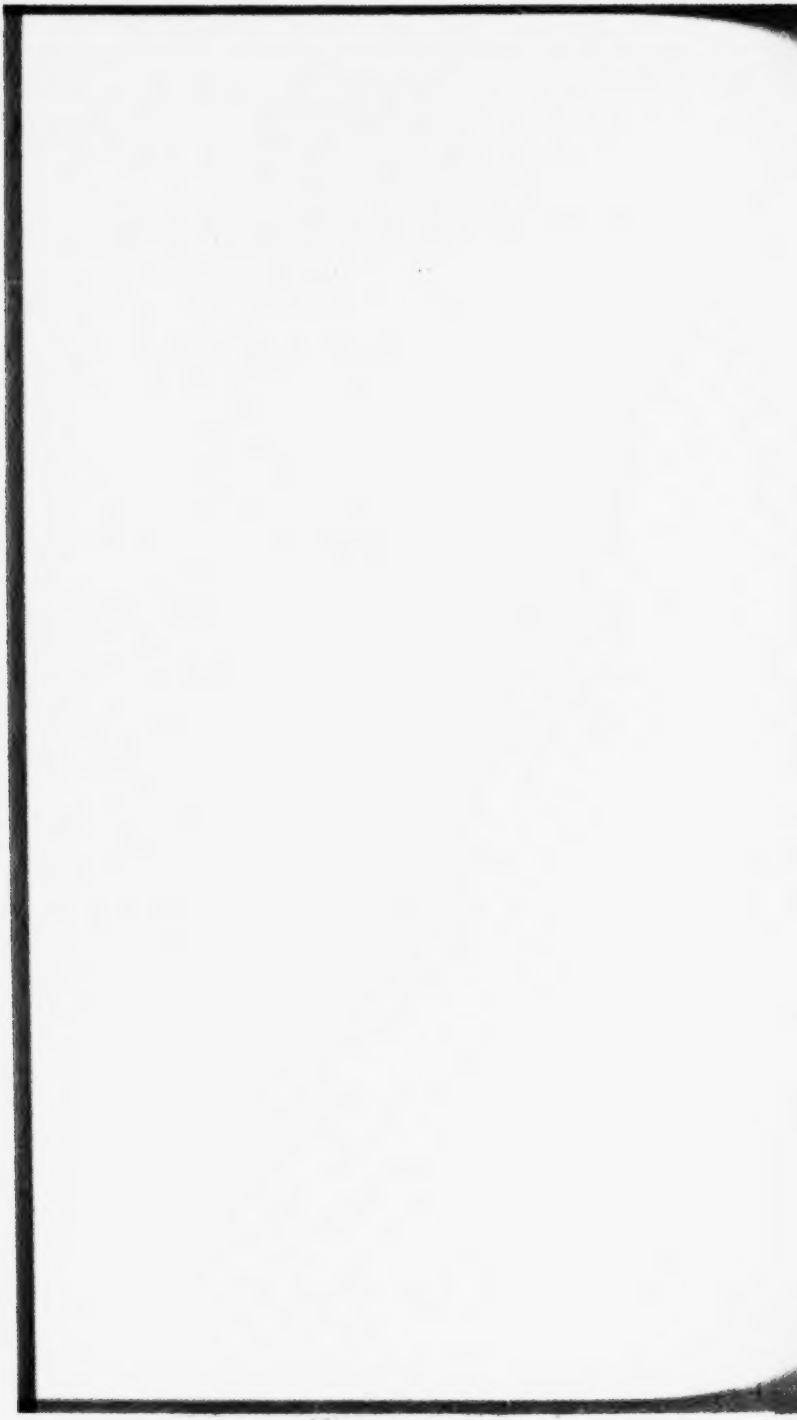

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1962.

No. .....

HOOPER ENLOE DENTON, OMER CLARENCE PHILLIPS, BILLY WEBB,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Hooper Enloe Denton, Omer Clarence Phillips and Billy Webb pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on August 29, 1962.

OPINION BELOW

The District Court did not render a written opinion. The decision and judgment of the Court of Appeals for the Sixth Circuit are annexed hereto as an appendix, on page A1.

JURISDICTION

The judgment of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Should the motions to suppress, filed by petitioners Denton and Webb, have been overruled?

(2) Were the convictions of petitioners void because the case was prosecuted by counsel who was not a United States Attorney, nor an Assistant United States Attorney, nor an attorney appointed by the Attorney General, and one who had not taken the oath required of a prosecuting attorney?

(3) Was it error for the District Court to charge the jury as follows:

> "When, for example, the government has reasonable grounds for believing that a person is engaged in illicit sale of non-taxpaid whiskey, it is not unlawful entrapment for a government agent to pretend to be some one else and to offer, either directly or through an informer or other decoy, to purchase non-taxpaid whiskey from such suspected person"?

(4) Was it error for the District Court to charge that if petitioners were ready and willing to violate the law, there could be no unlawful entrapment?

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(5) Was it error for the District Court to refuse to charge as follows:

> "The Court instructs the jury that the function of law enforcement is the prevention of crime and the apprehension of criminals. That function does not include the manufacturing of crime. Entrapment occurs when the criminal conduct was 'the product of the creative activity' of law-enforcement officials"?

(6) Was it error for the District Court to refuse to charge as follows:

> "The Court instructs the jury that the defendants rely upon the defense of entrapment which means that the defendants committed the act which constitutes the violation of the law, but seek to avoid criminal responsibility by showing that the said violation was instigated by police officials or persons acting under their direction, and that it was not the intention of the defendants to commit such violation. The test of the criminality is, whether the police officers or those acting under them suggested the commission of the criminal act to the defendants, or lured the defendants into committing such act. If you find from the evidence that the police authorities, or their agents, representative, or persons acting under them, first suggested the commission of the criminal act to the defendants, or lured the defendants into committing such criminal act, then this would constitute entrapment and is a valid defense which entitles the defendants to an acquittal"?

(7) Did the District Court err in limiting the cross-examination of the government's paid informer, Prevatte?

(8) Did the District Court err in permitting the United States Attorney to cross-examine petitioner Denton concerning an offense for which he had been pardoned?

(9) Did the District Court err in admitting evidence relating to an illicit distillery?

(10) Was there substantial evidence to convict petitioners Phillips and Webb?

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the Constitution of the United States.

STATUTES INVOLVED

UNITED STATES CODE.

Title 5, Sections 310 and 315; Title 18, Section 371; Title 26, Sections 5205(a) (2), 5604(a), 5605(a), 5691(a), and 7206(4); Title 28, Sections 503, 504, and 507.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee on September 25, 1961. Petitioner Denton was convicted on Counts 1, 5, 6, 7, 8 and 9 of the indictment (26 U.S.C. 5205(a) (2), 5604(a), 7206(4), 5691(a), and 18 U.S.C. 371), and was given a five-year sentence on all counts to run concurrently.

Petitioner Phillips was convicted on Counts 5 and 6 of the indictment (26 U.S.C. 5205(a) (2), and 7206(4), and was given two concurrent sentences of one-year each to commence at the expiration of a sentence he was then serving.

Petitioner Webb was convicted on Counts 5 and 6 of the indictment (26 U.S.C. 5205(a) (2), and 7206(4), and his sentence was suspended, and he was placed on probation for five years.

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Counts 10, 11, and 12 of the indictment were dismissed by the United States Attorney at the beginning of the trial.

All Code sections set forth in the indictment pertain to the illicit manufacture and possession of distilled spirits upon which the tax had not been paid.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred in holding:

(1) The motions to suppress of petitioners Denton and Webb should not have been sustained as a matter of law.

(2) It was not error to permit the prosecution of petitioners by an attorney who was not a United States Attorney, nor an Assistant United States Attorney, and had not taken the oath prescribed for a prosecuting attorney.

(3) It was not error for the District Court to charge the jury as follows:

> "When, for example, the government has reasonable grounds for believing that a person is engaged in illicit sale of non-taxpaid whiskey, it is not unlawful entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase non-taxpaid whiskey from such suspected person."

(4) It was not error for the District Court to charge that if petitioners were ready and willing to violate the law there could be no entrapment.

(5) It was not error for the District Court to refuse to charge as follows:

"The Court instructs the jury that the function of law enforcement is the prevention of crime and the apprehension of criminals. That function does not include the manufacturing of crime. Entrapment occurs when the criminal conduct was 'the product of the creative activity' of law-enforcement officials."

(6) It was not error for the District Court to refuse to charge as follows:

"The Court instructs the jury that the defendants rely upon the defense of entrapment which means that the defendants committed the act which constitutes the violation of the law, but seek to avoid criminal responsibility by showing that the said violation was instigated by police officials or persons acting under their direction, and that it was not the intention of the defendants to commit such violation. The test of the criminality is, whether the police officers or those acting under them suggested the commission of the criminal act to the defendants, or lured the defendants into committing such act. If you find from the evidence that the police authorities, or their agents, representative, or persons acting under them, first suggested the commission of the criminal act to the defendants, or lured the defendants into committing such criminal act, then this would constitute entrapment and is a valid defense which entitles the defendants to an acquittal."

(7) It was not error for the District Court to limit the cross-examination of the paid government informer Prevatte.

(8) It was not error for the District Court to permit the prosecution to cross-examine petitioner Denton concerning an offense for which he had been pardoned.

(9) It was not error for the District Court to admit evidence pertaining to an illicit distillery.

(10) There was substantial evidence to convict petitioners Phillips and Webb.

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REASONS FOR GRANTING THE WRIT

The questions here presented are substantial ones, and we feel are of wide-spread importance.

Specification of Error No. (1). The first question presents a holding by the United States Court of Appeals for the Sixth Circuit which we deem to be contrary to the holdings of this Court.

The government employed an informer, John Vester Prevatte, and agreed to pay him on the basis of the results obtained, thus making him a "bounty hunter".

Prevatte presented himself under an assumed name and stated that he had had a legitimate business in North Carolina and left because of trouble with the sheriff, all of which statements were false. The informer represented to petitioner Denton's brother that he was in the community to buy a legitimate business and persuaded petitioner Denton's brother to take him to Petitioner Denton's home for the purpose of leasing a truck stop and restaurant which petitioner Denton had under construction. At that time petitioner Denton was sick and had just returned from a hospital. The lease of the truck stop and restaurant would have been a very lucrative, legitimate transaction for petitioner Denton. The informer said he was hauling illicit whiskey until he could lease said truck stop. Government agent Bryant accompanied informer Prevatte and was represented to petitioner Denton as being a driver for informer Prevatte hauling illicit whiskey, which was untrue. Government agent Bryant told petitioner Denton that he had been working for Prevatte hauling illicit whiskey off and on for four or five years, which was untrue.

Prevatte and Bryant thus made false and fraudulent representations to gain access to petitioner Denton's home and to gain his confidence.

Physical force is not necessary to violate the Fourth Amendment to the Constitution of the United States. Entry by stealth is equivalent to entry by force. *Gouled* v. *U. S.*, (1921) 255 U.S. 298.

Appeals to sympathy, friendship, and the possibility of exorbitant gain will not be tolerated even against a past offender, and the use of such methods constitutes entrapment as a matter of law. *Sherman* v. *U. S.*, 356 U.S. 369. See also *Sorrells* v. *U. S.*, 287 U.S. 435.

The opinion of the United States Court of Appeals for the Sixth Circuit in the instant case cites *Bush* v. *U. S.*, 283 F.2d 51, in support of its decision.

In the *Bush* case, the government agent in gaining access to defendant's home did not employ stealth and misrepresentations, but only posed as a member of the general public and this was held permissible. We submit that the doctrine of *Bush* v. *U. S., supra,* should not be extended. *Silverman* v. *U. S.*, 365 U.S. 505.

In *Sorrells* v. *U. S., supra,* there was a conflict in the evidence with respect to entrapment, and the matter of entrapmen was thus submitted to the jury. In *Sherman* v. *U. S., supra,* the evidence was undisputed on the question of entrapment and the issue of entrapment thus became a question of law for decision by the court. In the instant case, there was no dispute as to the false representations made and the District Court should have sustained the motions to suppress all evidence obtained by such methods.

The evidence pertaining to petitioners Phillips and Webb was gained by the informant and government agent

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through the illegal trespass, as aforesaid, upon Petitioner Denton's property and for this reason, the evidence should have been suppressed as to them. *Jones* v. *U. S.*, 362 U.S. 257.

Specification of Error No. (2). William P. Crewe, Assistant Regional Counsel of the Internal Revenue Service, assisted in the prosecution of petitioners by making objections, examining witnesses and making the opening argument to the jury. The pertinent Code sections pertaining to this question are as follows:

5 U.S.C. 310 provides as follows:

> "*Conduct of legal proceedings.* The Attorney General or any officer of the Department of Justice, or any Attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816)."

5 U.S.C 315 provides as follows:

> "*Appointment and oath of special attorneys.* Every attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney and shall take the oath required by law. Foreign counsel employed in special cases shall not be required to taks such oath. As amended Apr. 17, 1930, c. 174, 46 Stat. 170; June 25, 1948, c. 646, 3, 62 Stat. 985."

28 U.S.C. 503 provides as follows:

> "*Appointment of attorneys.* The Attorney General may appoint attorneys to assist United States Attorneys when the public interest so requires. June 25, 1948, c. 646, 62 Stat. 909."

28 U.S.C. 504 expressly provides that a prosecuting attorney must take an oath to execute his duties faithfully before taking office.

28 U.S.C. 507 makes it encumbent upon the United States Attorney to prosecute crimes against the United States.

The United States Court of Appeals for the Sixth Circuit in its decision in the instant case justifies the appearance of Mr. Crewe as prosecuting attorney because one of the Assistant United States Attorneys also participated in the trial. We feel that the participation of any interloper or outsider not qualified by the required oath vitiates the verdict and deprives the court of jurisdiction. *U. S.* v. *Houston,* (D.C., 1928) 28 F.2d 451; *U. S.* v. *1960 Acres of Land, etc.,* (D.C., Calif. 1944) 54 F. Supp. 867; *U. S.* v. *Virginia Chemical Company,* (C.C. Tenn., 1908) 163 Fed. 66.

Specification of Error No. (3). The District Court charged the jury as follows with respect to entrapment:

> "When, for example, the government has reasonable grounds for believing that a person is engaged in illicit sale of non-taxpaid whiskey, it is not unlawful entrapment for a government agent to pretend to be some one else and to offer, either directly or through an informer or other decoy, to purchase non-taxpaid whiskey from such suspected person."

This charge was seasonably objected to by defense counsel. The sum and substance of the charge is that if

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government officers had reasonable grounds to suspect persons were selling illegal whiskey, the officers could use entrapment to arrest them, or use any means to induce them to commit a crime. The District Court in effect put the test of the reasonableness of the information in the possession of the government officers and it made no difference whether the information was reliable.

In *Sherman* v. *U. S., supra,* Justice Frankfurter, in a concurring opinion, held:

> "*No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities.* Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored." (Emphasis supplied).

For the reasons set out in *Sherman* v. *U. S., supra,* this charge by the District Court in the instant case was erroneous.

Specification of Error No. (4). The District Court in sum and substance charged the jury that if petitioners were ready and willing to violate the law there could be no unlawful entrapment. Evidence pertaining to petitioners' predisposition and criminal design is relevant but not controlling. In *Sorrells* v. *U. S., supra,* this Court said:

> "The predisposition and criminal design of the defendant are relevant. But the issues raised and the

evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."

Specification of Error No. (5). The District Court refused a request to charge made by defense counsel as follows:

> "The Court instructs the jury that the function of law enforcement is the prevention of crime and the apprehension of criminals. That function does not include the manufacturing of crime. Entrapment occurs when the criminal conduct was 'the product of the creative activity' of law-enforcement officials."

This request to charge was taken from the language of this Court in *Sorrells* v. *U. S., supra,* and we submit that the District Court erred in not including it in its charge to the jury.

Specification of Error No. (6). The District Court also refused to charge defense counsel's request as follows:

> "The Court instructs the Jury that the defendants rely upon the defense of entrapment which means that the defendants committed the act which constitutes the violation of the law, but seeks to avoid criminal responsibility by showing that the said violation was instigated by police officials or persons acting under their direction, and that it was not the intention of the defendants to commit such violation. The test of the criminality is, whether the police officers or those acting under them suggested the commission of the criminal act to the defendants, or lured the defendants into committing such act. If you find from the evidence that the police authorities, or their agents, representative, or persons acting under them, first suggested the commission of the criminal act to the defendants, or lured the defendants into committing such criminal

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act, then this would constitute entrapment and is a valid defense which entitles the defendants to an acquittal."

In making this request, defense counsel relied upon the holding of this Court in *Sorrells* v. *U. S.*, *supra*, and *Sherman* v. *U. S.*, *supra*, and it is submitted that the District Court should have given this charge as requested, and that the failure to do so was erroneous.

Specification of Error No. (7). On cross-examination of Prevatte, the paid government informer, the following occurred:

"Q. Do you, Mr. Prevatte, see anything wrong with telling a man a falsehood in order to get him arrested?

MR. C. D. MEEK: If the Court please I object to this.

THE COURT: This is a question for the jury. That is not the way to cross examine a witness. Go ahead.

MR. QUILLEN: I think it goes to his credibility.

THE COURT: I sustain the objection. Go to something else."

The District Court further sustained objections to the cross-examination of the informant concerning whether he was still working as a paid informant for the government and the amount of his compensation. Petitioners' defense depended greatly upon the credibility of the paid government informer. If he were still working for the government as an informer, and making a great deal of money in doing so, he would naturally have an interest in the outcome of the instant case. It would flavor his testimony and color it. He was interested in keeping his job with the government. The jury was entitled to know to what extent the informant would go to earn his bounty.

It is true that a trial court has wide latitude in controlling cross-examination, but such principle does not justify a curtailment of evidence which keeps from the jury relevant and important facts bearing on the veracity of such crucial testimony. *Gordon* v. *U. S.*, 344 U.S. 414.

Specification of Error No. (8). It was error to permit the government to cross-examine petitioner Denton concerning a conviction in 1936 of murder in the second degree, for which offense he had received a full pardon.

The United States Court of Appeals for the Sixth Circuit in the instant case held that even though petitioner Denton received a full pardon of the offense he could be cross-examined concerning such conviction as bearing on his credibility as a witness.

We submit that this holding in the instant case is directly contrary to the holdings of this Honorable Court. In *U. S.* v. *Wilson*, 7 Pet. 150, this Court, speaking through Chief Justice Marshall, stated:

> "The reason why a court must ex officio take notice of a pardon by act of Parliament, is that it is considered as a public law; having the same effect on the case as if the general law punishing the offense had been repealed or annulled."

This Honorable Court also held in *Ex parte Garland*, 4 Wall. 380, as follows:

> "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that *in the eye of the law the offender is as innocent as if he had never committed the offense.* If granted before conviction, it prevents any of the penalties or disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and

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restores him to all his civil rights; it makes him, as it were, a new man, *and gives him a new credit and capacity.*" (Emphasis supplied).

When an individual has been wrongfully convicted and such fact recognized by executive clemency, he should not thereafter be prejudiced by over-zealous prosecuting attorneys attempting to obtain a conviction. The sole purpose of such cross-examination of petitioner Denton was to prejudice his rights in the eyes of the jury by convincing them that he was a man of violence. The District Court admitted the evidence with the instruction to the jury that it could be considered by them as affecting petitioner Denton's credibility as a witness. In the eyes of laymen, such as jurors, this bit of evidence alone may well have been the scintilla which weighted the scales on the government's side.

Specification of Error No. (9). The District Court admitted evidence relating to an illicit distillery and permitted statements allegedly made by petitioners Denton and Phillips concerning the purchase of a distillery. A distillery is not mentioned in the indictment, and the admission of this evidence was highly prejudicial to the rights of petitioners.

Specification of Error No. (10). The only evidence in the record pertaining to petitioner Phillips is that he was a passenger in a government vehicle allegedly containing illicit whiskey which had been purchased by agent Bryant and informer Prevatte, and that petitioner Webb drove the vehicle from petitioner Denton's residence to another residence, where petitioners Phillips and Webb assisted in putting air in some air lifts on said government vehicle. There is no evidence that petitioners Webb and Phillips had any interest in the whiskey, or that they loaded the whiskey, or touched it in any manner, and the whiskey was

covered by a blanket where it could not be seen. The charge in the indictment against petitioners Webb and Phillips was possession, sale and transfer of illicit whiskey in this vehicle. The evidence adduced was certainly not sufficient to convict petitioners Phillips and Webb for knowingly removing, depositing or concealing this whiskey with intent to evade taxes, as charged in the indictment. See *U. S.* v. *McKenzie,* (C.C.A. 6) decided May 3, 1962.

Furthermore, if there were any whiskey in the vehicle, it was already owned by the United States government, and once it became the property of the United States it was no longer illicit whiskey and petitioners Phillips and Webb could not be guilty of aiding and abetting in its possession, removal, deposit or concealment with intent to evade taxes.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
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Knoxville, Tennessee,
Counsel for Petitioners.

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No. 14,854

JUDGMENT

August 29, 1962

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ MARION S. BOYD,
United States District Judge,
(Sitting by Designation).

No. 14,855

JUDGMENT

August 29, 1962

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ MARION S. BOYD,
United States District Judge,
(Sitting by Designation).

No. 14,856

JUDGMENT

August 29, 1962

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ MARION S. BOYD,
United States District Judge,
(Sitting by Designation).

Nos. 14854-5-6

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOOPER ENLOE DENTON. Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OMER CLARENCE PHILLIPS, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BILLY WEBB. Defendant-Appellant.	APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division

(Filed August 29, 1962. Carl W. Reuss, Clerk.)

DECIDED AUGUST 29, 1962.

Before: CECIL and WEICK, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. The appellants and others were charged in the District Court with conspiracy to violate certain revenue laws of the United States relating to illicit liquor. Title 18, U.S.C., Sec. 371.

They were also charged with substantive violations of several of these statutes.

Appellant Denton was convicted by the jury of conspiracy and of the substantive offenses with which he was charged in five additional counts. Title 26, U.S.C., Sec-

tions 5205(a) (2), 5604(a), 7206(4), and 5691(a). He was given concurrent sentences by the trial judge totalling five (5) years.

The jury acquitted appellants Phillips and Webb on the conspiracy count of the indictment, but found them guilty under two substantive counts for their handling of the liquor herein and their participation in violations of Title 26, U.S.C., Sections 5205(a) (2), and 7206(4). Phillips was given two concurrent sentences of one year by the District Judge to commence at the expiration of a sentence he was then serving. Webb's sentence was suspended and he was placed on probation for a period of five (5) years.

The series of transactions leading to the arrest and conviction of the appellants took place in Cocke County, Tennessee, and revolved around an undercover agent for the Alcohol Tax Unit and a government informer. The informer purchased from appellant Denton two large quantities of non-taxpaid liquor on separate occasions. The informer on the occasions of the purchases aforesaid went to the Denton home, represented himself to be engaged in the illicit liquor traffic in the State of North Carolina, and introduced the accompanying A. T. U. agent as his driver. On one of these occasions the appellants Phillips and Webb, among other things, transported the contraband liquor in question for short distances. The liquor aforesaid so purchased and handled was introduced in evidence in the trial court.

Appellants assign a number of errors on this appeal. It is urged among other things that the evidence aforesaid was obtained as results of illegal exploratory searches and seizures and should have been suppressed by the trial judge as to all defendants. The trial judge found no merit in this contention and with this conclusion we agree, since

upon the evidence adduced, there was no such search or search of any kind of the Denton premises involved. *United States* v. *Bush,* 283 F.2d 51 (C.A. 6), 1960.

The appellants further contend on this appeal that they were entitled to a verdict of acquittal by the trial judge on the grounds of entrapment and that the trial judge erred in not directing such verdict as a matter of law. The basis for this position is that the government agent working with the informer arranged for the purchases of liquor herein. The trial judge ruled the question of entrapment was for the jury and he adequately instructed the jury in this connection. The submission of this issue to the jury was proper and there was ample evidence from which the jury could reasonably find the appellants were not victims of entrapment. *Sorrells* v. *United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932); *Sherman* v. *United States,* 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958); *Morales* v. *United States,* 260 F.2d 939, C.A. 6 (1958); *Masciale* v. *United States,* 356 U.S. 386, 78 S. Ct. 827, 2 L. Ed. 859 (1958); *United States* v. *Hackett,* 303 F.2d 33, C.A. 6 (1962).

The appellants next claim the convictions herein are void on the ground that the court did not have jurisdiction of this cause. This claim grows out of the appearance in the trial of William P. Crewe, Assistant Regional Counsel of the Internal Revenue Service. Mr. Crewe, who at the beginning of the trial was introduced to the trial court, questioned witnesses, and made the opening argument to the jury. No objection to his appearance in the trial was made at any time. Appellants cite Title 5, U.S.C., Sections 310 and 315, and Title 28, U.S.C., Sections 503, 504 and 507, as authority for the claimed lack of jurisdiction. In essence, the Code sections require certain legal personnel retained by the Department of Justice in special

cases to be appointed by the Attorney General and take oath before assuming their duties. The Title 28 enactments are based upon the Title 5 provisions and the legislative history behind such provisions is extensively covered in *United States* v. *Crosthwaite,* 168 U.S. 345 (sic). This history shows that such requirements were a result of duplication of expenditure by the government in prosecution of causes and defense of claims. When this was brought to the attention of the Congress, the Attorney General was required by statute to certify the necessity for special legal personnel and the performance of services by such personnel. Mr. Crewe was not on "specially retained" basis as contemplated by these enactments. Title 5, U.S.C., Section 315.

If the United States appear in a cause only through a special assistant, who has no authority, then the United States as a party may not be properly in court. The record here, however, shows the case against these appellants to have been initiated by the United States Attorney and the trial conducted by an Assistant United States Attorney. Title 5, U.S.C., Section 310, deals only with conduct of the proceedings by proper authority, with which there was compliance. Mr. Crewe assisted, but it cannot be said he conducted the trial. It follows that Mr. Crewe's appearance in the trial did not deprive the court of jurisdiction. The proceedings and resulting convictions cannot be said to have been void.

Appellant Denton contends the trial court erred in permitting him to be cross-examined concerning a prior conviction of second degree murder, for which he had received full pardon. The trial court ruled the question proper as going to Denton's credibility as a witness. The authorities concerning the effect of executive clemency are collected in *Petition of de Angelis,* 139 F. Supp. 779, wherein

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it was held that a pardon relieves of the consequences of conviction of crime, but does not obliterate the conviction itself. This court considered the admissibility of evidence of prior convictions in *Henderson* v. *United States,* 202 F.2d 400, at pages 405 and 406, C.A. 6, cert. denied 349 U.S. 920 (1955). In that case it was held that cross-examination concerning prior convictions, which bear on credibility, should be limited as at common law to proof of convictions of felonies or crimes involving moral turpitude. It results the trial court did not err in permitting cross-examination of appellant Denton concerning former conviction of felony, although he had received a full pardon.

The latitude accorded the trial judge and the substantiality of the evidence against these appellants as shown by the record dispense with the necessity of discussing other questions presented herein. There being no reversible error, the District Court is in all things affirmed.